

1 Kathleen Sullivan (SBN 242261)
 kathleensullivan@quinnmanuel.com
 2 QUINN EMANUEL URQUHART &
 SULLIVAN LLP
 3 51 Madison Avenue, 22nd Floor
 New York, NY 10010
 4 Telephone: (212) 849-7000
 Facsimile: (212) 849-7100

5 Sean S. Pak (SBN 219032)
 seanpak@quinnmanuel.com
 6 Amy H. Candido (SBN 237829)
 amycandido@quinnmanuel.com
 7 John M. Neukom (SBN 275887)
 johnneukom@quinnmanuel.com.
 8 QUINN EMANUEL URQUHART &
 SULLIVAN LLP
 9 50 California Street, 22nd Floor
 San Francisco, CA 94111
 10 Telephone: (415) 875-6600
 11 Facsimile: (415) 875-6700

12 Mark Tung (SBN 245782)
 marktung@quinnmanuel.com
 13 QUINN EMANUEL URQUHART &
 SULLIVAN LLP
 14 555 Twin Dolphin Drive, 5th Floor
 Redwood Shores, CA 94065
 15 Telephone: (650) 801-5000
 Facsimile: (650) 801-5100

16 Attorneys for Plaintiff Cisco Systems, Inc.

17 Steven Cherny (*admitted pro hac vice*)
 steven.cherny@kirkland.com
 KIRKLAND & ELLIS LLP
 601 Lexington Avenue
 New York, New York 10022
 Telephone: (212) 446-4800
 Facsimile: (212) 446-4900

18 Adam R. Alper (SBN 196834)
 adam.alper@kirkland.com
 KIRKLAND & ELLIS LLP
 555 California Street
 San Francisco, California 94104
 Telephone: (415) 439-1400
 Facsimile: (415) 439-1500

19 Michael W. De Vries (SBN 211001)
 michael.devries@kirkland.com
 KIRKLAND & ELLIS LLP
 333 South Hope Street
 Los Angeles, California 90071
 Telephone: (213) 680-8400
 Facsimile: (213) 680-8500

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

20 CISCO SYSTEMS, INC.,

21 Plaintiff,

22 vs.

23 ARISTA NETWORKS, INC.,

24 Defendant.

25 CASE NO. 5:14-cv-5344-BLF

26 **CISCO'S OPPOSITION TO ARISTA'S
 CORRECTED NOTICE OF MOTION
 AND MOTION TO STRIKE EXPERT
 OPINIONS AND TESTIMONY OF DR.
 KEVIN C. ALMEROOTH**

REDACTED VERSION

27 Date: September 9, 2016
 Time: 9:00 a.m.
 Dept: Courtroom 3 - 5th Floor
 Judge: Hon. Beth Labson Freeman

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1 Plaintiff Cisco Systems, Inc. (“Cisco”) hereby respectfully opposes Defendant Arista
 2 Networks, Inc.’s (“Arista”) Corrected Motion to Strike Expert Opinions and Testimony of Dr.
 3 Kevin C. Almeroth (Dkt. 420, “Motion” or “Mot.”) based on the Memorandum of Points and
 4 Authorities below; the Declaration of John Neukom that is being filed herewith; and such other
 5 and further papers, evidence and argument as may be submitted to the Court in connection with
 6 the hearing on this Motion.

7 **I. INTRODUCTION**

8 Arista’s Motion does not challenge the qualifications of Cisco’s technical expert on
 9 copying—Professor Kevin Almeroth, Ph.D. Arista instead moves to strike highly relevant
 10 testimony from Professor Almeroth related to [REDACTED] Arista’s admitted copying
 11 of the [REDACTED] of Cisco’s CLI; facts underlying Professor Almeroth’s copying opinions;
 12 unspecified claims of “vouching”; and Arista’s admitted copying of Cisco’s copyrighted technical
 13 documents. As explained below, none of these arguments has merit, and Cisco respectfully
 14 requests that Arista’s Motion be denied.

15 **II. ARGUMENT**

16 **A. Professor Almeroth Should Not Be Excluded From Offering Opinions About**
 [REDACTED]

17 Arista argues that two of Professor Almeroth’s [REDACTED] opinions relating to Arista’s
 18 [REDACTED] and [REDACTED] copying should be rejected because they are purportedly
 19 unreliable. This claim has no merit: Professor Almeroth’s opinions are firmly rooted in decades
 20 of technical experience, hundreds of hours of case-specific analysis, as well as his review of Arista
 21 and Cisco source code, Arista devices, Arista documents and Arista witness testimony.

22 **1. Professor Almeroth Thoroughly Analyzed Source Code and
 Formulated Reliable Opinions That** [REDACTED]

23 Arista contends that Professor Almeroth’s opinion that [REDACTED]
 24 [REDACTED] Mot. at 3. All of Arista’s
 25 complaints fall flat. First, Arista complains that Professor Almeroth’s [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED] Mot. at 3-4. This argument is
 2 legally incorrect. There is nothing “unreliable” about a technical expert relying on his or her
 3 relevant experience to formulate expert opinions.¹ Fed. R. Evid. 702, Adv. Comm. Notes (2000)
 4 (“Nothing in this amendment is intended to suggest that experience alone—or experience in
 5 conjunction with other knowledge, skill, training or education—may not provide a sufficient
 6 foundation for expert testimony.”). Numerous courts have held that an expert’s reliance on
 7 experience to formulate technical opinions is proper. *See Icon-IP Pty Ltd. v. Specialized Bicycle*
 8 *Components, Inc.*, 87 F. Supp. 3d 928, 946 (N.D. Cal. 2015) (“The Ninth Circuit has found
 9 opinions based on an expert’s experience in the industry to be proper[.]”); *Radware, Ltd. v. F5*
 10 *Networks, Inc.*, No. 13-cv-02024-RMW, 2016 WL 590121, at *20–21 (N.D. Cal. Feb. 13, 2016)
 11 (same). As Professor Almeroth explained at his deposition, his characterization of [REDACTED]

12 [REDACTED]
 13 [REDACTED] which is an opinion firmly rooted in his background
 14 and “experience in programming parsers,” which Arista does not challenge. Almeroth Tr.
 15 (Declaration of Ryan K. Wong, Dkt. 419 (“Wong Decl.”) Ex. 3) at 279:12-14, 16-17, 280:4-5,
 16 281:6-12. Indeed, Arista does not dispute that Professor Almeroth is a qualified technical expert
 17 in computer science and networking. He has 35 years of experience with computer software and
 18 has reviewed “innumerable” lines of source code written by many different programmers over
 19 those 35 years. Opening Rpt. (Declaration of John M. Neukom (“Neukom Decl.”) Ex. 1) at ¶ 29.²
 20 He teaches university courses in the operation of the network devices at issue in this case
 21 including command line interface programs and the underlying software that runs those programs.
 22 *Id.* He has analyzed source code of roughly ten network device vendors including Cisco, Arista,

23 ¹ In fact, Arista’s expert Dr. Black relied on [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]

27 ² References to “Opening Report” or “Opening Rpt.” refer to Professor Almeroth’s Opening
 28 Expert Report. References to “Rebuttal Report” or “Rebuttal Rpt.” refer to Professor Almeroth’s Rebuttal Report.

1 A10, 3Com, Quagga, and Foundry, among others. Almeroth Tr. (Neukom Decl. Ex. 2) at 9:1-
 2 10:12, 13:24-14:2. He has spent many hours interacting with various network device vendors
 3 operating systems including Cisco, Arista, HP, 3Com, Bay, Nortel, IBM, Juniper, Wellfleet,
 4 Netgear, D-Link, Brocade, and Foundry. *Id.* at 12:9-19, 13:7-14:2. And Professor Almeroth
 5 explained that his 35 years of experience have given him the expertise to understand the different
 6 ways that programs (*e.g.*, parsers) are written to solve similar problems: “What I have found in my
 7 decades of experience is that engineers and programmers find many ways to write commands and
 8 programs to express solutions to the same problem.” Opening Rpt. (Neukom Decl. Ex. 1) at ¶ 30;
 9 Almeroth Tr. (Wong Decl. Ex. 3) at 285:21-25 (“So it’s based on my experience in the use of
 10 parsers and the design of parsers and the way that they operate....”). Arista’s complaints are thus
 11 legally erroneous and any issues Arista would like to raise about this testimony are more properly
 12 addressed during cross examination.

13 Second, Arista complains that Professor Almeroth failed to [REDACTED]

14 [REDACTED] This claim is contradicted by the record.
 15 Professor Almeroth spent hundreds of hours analyzing the evidence and formulating his opinions
 16 in this case. Almeroth Tr. (Neukom Decl. Ex. 2) at 50:11-14; Opening Rpt. (Wong Decl. Ex. 1) at
 17 ¶ 37; Opening Rpt. (Neukom Decl. Ex. 1) ¶ 47. He analyzed “certainly, thousands of lines of
 18 code for both Cisco and Arista,” and testified that he “would be surprised if it was less than a
 19 million lines of code.” Almeroth Tr. (Wong Decl. Ex. 3) at 67:11-68:21. In his Opening Report,
 20 Professor Almeroth explained in detail, [REDACTED]

21 [REDACTED] Opening Rpt.
 22 (Wong Decl. Ex. 1) at ¶¶ 82-86. Professor Almeroth provided specific evidence in the form of
 23 citations to [REDACTED]
 24 [REDACTED]

25 [REDACTED] *Id.* Exhibit Copying-6 to Professor Almeroth’s
 26 Opening Report also pin cites hundreds of lines [REDACTED]

27 [REDACTED] Almeroth Tr. (Wong Decl.
 28 Ex. 3) at 287:8-25 [REDACTED]

1 [REDACTED]

2 Third, Arista's claim that Professor Almeroth failed to [REDACTED]

3 [REDACTED]

4 [REDACTED] Mot. at 3-4. The Court does not need to

5 look any further than the table of contents in Professor Almeroth's Opening Report to see that

6 Arista's claim is wrong. An entire section of the Opening Report, titled "Arista Had Access To

7 Cisco's Copyrighted Works & Admitted Copying," cites [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED] Further, in Paragraph 143 of his Opening Report,

14 Professor Almeroth pointed out that numerous Arista executives and engineers are former Cisco

15 executives and engineers, one of whom is Arista's CEO, who claims to have "built" Cisco's

16 products. *Id.* ¶ 143. [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Arista's argument that Professor Almeroth [REDACTED]

22 [REDACTED] is thus baseless. Mot. at 6 (citing *Claar v.*

23 *Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994)). In *Claar*, two expert opinions were

24 excluded because, *inter alia*, the experts intentionally ignored other potential causes of plaintiff's

25 injuries that the experts had "admitted ... would be standard procedures before arriving at a

26 diagnosis." *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994). Professor Almeroth

27 has never admitted to ignoring any "standard procedures" in formulating his opinions, and neither

28 has Arista identified any such "standard procedures" that were ignored. Professor Almeroth

1 instead analyzed millions of lines of source code, relied on his 35 years of experience, and then
 2 took the additional steps of reviewing Arista witness testimony and Arista documentation prior to
 3 reaching his ultimate conclusions: [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] Almeroth Tr. (Wong Decl. Ex. 3) at 283:4-17.

7 None of the other cases cited by Arista support its requested relief either:

- 8 • *Schudel v. General Electric Co.*, 120 F.3d 991 (9th Cir. 1997), *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187 (9th Cir. 2007), and *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 10 606 (9th Cir. 2002) are products liability/exposure and medical malpractice cases that provide no guidance for assessing “reliability” or “scientific acceptance” in the field of computer science or source code analysis. Indeed, *Domingo* upheld the exclusion of a novel medical theory linking extensive malleting to FES that had never before been written about, could be supported only by non-human animal studies, and contained logical flaws.
- 11 • *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-cv-03999-BLF, 2015 WL 4272870 (July 14, 12 2015) supports denying Arista’s Motion. Although this Court excluded an expert who had “disclose[d] no methodology other than to assert that he ‘personally perform [] tests on the 13 Accused Products,’ the Court refused to exclude expert opinions from two other experts 14 who, like Professor Almeroth, “disclosed their testing methodology and the results that 15 they observed” and had been “deposed and thus subjected to unfettered questioning 16 regarding their testing.” *Id.* *Finjan* thus shows that Arista’s Motion is a challenge “not so 17 much to the reliability of [Professor Almeroth’s opinions] as it is to the sufficiency of [his] 18 disclosures,” and should be denied. *Id.*
- 19 • *XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. 09-157-RGA, 2013 WL 1702159, at *1 (D. 20 Del. Feb. 25, 2013) is an inapposite one-page opinion excluding expert testimony about a 21 product that the expert-in-question **never analyzed** but instead attempted to offer an 22 opinion based on “inference.” There is no dispute here that Professor Almeroth analyzed 23 thousands of lines of the Arista source code.

- In *Fleming v. Escort, Inc.*, No. 1:cv 09-105-BLW, 2012 WL 12539337, at *3 (D. Idaho May 23, 2012), the Court excluded expert opinion where, unlike here, the expert failed to explain how the source code he relied on operated. And in *GPNE Corp. v. Apple, Inc.*, No. 12-cv-02885-LHK, 2014 WL 1494247, at *4 (N.D. Cal. Apr. 16, 2014), the court excluded a patent damages expert who failed to disclose the methodology (*i.e.*, the math) by which he derived his royalty rate, failed to apportion, and relied on licenses that did not support his opinions. Unlike *Fleming* and *GPNE*, where the experts offered “black box” opinions, here Professor Almeroth has provided a detailed narrative of [REDACTED]

Opening Rpt. (Wong Decl. Ex. 1) at

2. Professor Almeroth's Help Description Opinions Are Firmly Rooted In and Arista Device Testing

Arista also argues that Professor Almeroth's opinions relating to Arista's copying of Cisco's "help descriptions" should be excluded because, according to Arista, [REDACTED] [REDACTED] Mot. at 6. This argument does not accurately reflect Professor Almeroth's opinions. The 400+ help descriptions that Arista copied were [REDACTED] Professor Almeroth clearly set forth that opinion in, e.g., paragraphs 225 to 230 in his Opening Report. [REDACTED]

Moreover, Arista's argument fails because it ignores the opinions in Professor Almeroth's reports and deposition testimony where he explained that he did, in fact,

1 [REDACTED]. *E.g.*, Opening Rpt. (Wong Decl. Ex. 1) at ¶¶ 37, 47, 225-230.
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] He then explained those
 5 opinions at his deposition. Almeroth Tr. (Wong Decl. Ex. 3) at 287:18-25. In contrast, Arista's
 6 expert does not [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED] This Court should not exclude
 10 Professor Almeroth's opinions simply because Arista is incapable of rebutting them.

11 **B. Professor Almeroth Should Not Be Excluded From Offering Opinions That**
 12 **Arista Copied The [REDACTED] Of Cisco's CLI**

13 Arista contends that Professor Almeroth's opinion that Arista copied Cisco's [REDACTED]
 14 [REDACTED] is unreliable because he did not define the [REDACTED] Mot. at 7-8. This claim is
 15 contradicted by Professor Almeroth's reports. According to Professor Almeroth's reports, the
 16 Cisco CLI "look and feel" is comprised of the command line interface and its displays including
 17 the command expressions, command outputs, hierarchies, modes, prompts, and help descriptions
 18 screens. Opening Rpt. (Wong Decl. Ex. 1) at ¶ 65 (outputs), ¶ 174 (commands); Rebuttal
 19 Rpt. (Wong Decl. Ex. 2) at ¶ 64 (commands, outputs, hierarchies, modes, prompts, help screens,
 20 documents), ¶¶ 136, 145. Professor Almeroth confirmed this at his deposition. Almeroth Tr.
 21 (Wong Decl. Ex. 3) at 126:6-18. And according to Professor Almeroth, [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 Professor Almeroth reached these conclusions by first testing
 25 both Cisco's and Arista's CLIs and then reviewing other available evidence, such as Arista
 26 documents and public statements. For example, Arista has admitted publicly and privately that
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] Professor Almeroth also
 3 looked to third party sources to confirm his opinions and found that industry analysts agreed with
 4 his opinions. Rebuttal Rpt. (Wong Decl. Ex. 2) at ¶ 150 (“[Arista] created a CLI that looks and
 5 acts very much like Cisco’s....”; “when I say ‘CISCO like’ I mean it’s 95% the same
 6 commands”). Accordingly, there is no merit to Arista’s claim [REDACTED]
 7 [REDACTED]—that is precisely what Professor
 8 Almeroth did, and he confirmed his opinions with additional available evidence.

9 Arista also argues that Professor Almeroth’s [REDACTED] opinions should be excluded
 10 because at his deposition Professor Almeroth mentioned that there are similarities between Cisco’s
 11 CLI and Arista’s CLI in addition to those at issue here. Mot. at 8. This is nothing more than a
 12 strawman argument, and it should be rejected. None of Professor Almeroth’s [REDACTED]
 13 opinions rely on any of those additional similarities—they are not mentioned in his reports and do
 14 not form the basis for his opinions in those reports. Almeroth Tr. (Wong Decl. Ex. 3) at 127:21-
 15 23 [REDACTED]
 16 [REDACTED] (emphasis added). Arista’s copying of additional CLI elements from Cisco that
 17 Cisco is not asserting in this case does not negate Arista’s infringement of the Cisco copyrighted
 18 works. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). Arista’s
 19 complaint thus seeks to manufacture an irrelevant dispute, and it should be rejected.

20 **C. Professor Almeroth Should Not Be Excluded From Presenting Factual
 21 Evidence That Supports Arista’s Liability For Copyright Infringement**

22 Cisco does not dispute that technical experts should not opine on the subjective beliefs of
 23 others. In its Motion, however, Arista seeks to extend that unremarkable proposition to all *facts* as
 24 well. Mot. at 9. Arista argues that Professor Almeroth should not be permitted to cite or rely on
 25 deposition testimony where Arista’s employees [REDACTED]

26 [REDACTED] *Id.* Arista, however, fails to identify any specific
 27 instance where Professor Almeroth has offered opinions as to “intent” or the “subjective beliefs”
 28 of others. *Id.* Arista merely offers a string cite of dozens of paragraphs without identifying what

1 in those many paragraphs it finds objectionable. *Id.* It is black letter law that experts may rely on
 2 and recite facts that underlie their opinions in order to explain the basis of their opinions to the
 3 jury. Fed. R. Evid. 703. The Ninth Circuit has repeatedly confirmed this. *United States v.*
 4 *Cazares*, 788 F.3d 956, 978 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2484 (2016) (“An expert may
 5 base an opinion on facts or data in the case that the expert has been made aware of or personally
 6 observed.”); *Paddock v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261–62 (9th Cir. 1984). Thus, to
 7 the extent that Arista seeks relief beyond excluding expert testimony on intent—and wants to
 8 exclude Professor Almeroth from presenting evidence from which the jury could conclude for
 9 themselves that Arista is liable for copyright infringement—such relief should be denied. Fed. R.
 10 Evid. 702, Adv. Comm. Notes (2000) (encouraging “the use of expert testimony in non-opinion
 11 form when counsel believes the trier can itself draw the requisite inference”); *Spreadsheet*
 12 *Automation Corp. v. Microsoft Corp.*, 587 F. Supp. 2d 794, 803 (E.D. Tex. 2007).

13 **D. Professor Almeroth Should Not Be Excluded From Presenting Opinions
 Firmly Based On Facts**

14 Arista argues that experts should not “vouch” for the credibility of fact witnesses. Mot. at
 15 9–10. This is another unremarkable proposition, and Cisco has no intention of having any expert
 16 “vouch” for any fact witness. Thus, to the extent Arista seeks to exclude “vouching” testimony,
 17 Cisco has no objection so long as the Court’s order is applied to Arista and Cisco equally.
 18

19 Arista’s vague claim, however, that Professor Almeroth “vouches for Cisco’s view of
 20 disputed facts” lacks merit. Yet again Arista fails to actually identify any instance of this alleged
 21 “vouching.” *Id.* Arista instead string cites a dozen paragraphs without identifying who Professor
 22 Almeroth is “vouching” for or what “disputed fact” he is vouching for or even what portion of the
 23 cited paragraphs might be relevant to Arista’s motion. *Id.* at 10. Arista provides no guidance that
 24 would enable Cisco or the Court to fully understand the specific facts that Arista believes are
 25 being “vouched” for. *Id.* As just one example, Paragraph 51 in Professor Almeroth’s Opening
 26 addresses the creation of Cisco’s CLI and reflects Professor Almeroth’s opinions and their basis—
 27 no testimony or facts are being “buttressed.” Opening Rpt. (Wong Decl. Ex. 1) at ¶ 51. Paragraph
 28 98 likewise cites no testimony or any proposition that Professor Almeroth could be said to be

1 improperly “buttressing”—it again reflects his opinions based on the materials he reviewed. *Id.* at
 2 ¶98. Arista’s vague “voicing” complaints, lacking specifics, should be rejected.

3 **E. Professor Almeroth Should Not Be Excluded From Presenting Undisputed
 4 Evidence That Arista Copied Cisco’s Technical Documents**

5 Having offered no opinions from its own expert to rebut Professor Almeroth’s opinion that
 6 Arista copied Cisco’s technical documents, Arista now desperately seeks to exclude those
 7 uncontested opinions. Mot. at 10. The thrust of Arista’s argument is that because a layperson
 8 could [REDACTED]

9 [REDACTED]³ Arista’s attempt to downplay the
 10 copying analysis should be rejected. Arista’s argument ignores the expertise and rigor that
 11 Professor Almeroth put into his analysis in formulating his opinion that Arista **copied** Cisco’s
 12 documentation. Unlike Arista’s technical expert, Professor Almeroth is an expert in plagiarism—
 13 he has spent years researching plagiarism and creating tools to assist in plagiarism detection.
 14 Almeroth Tr. (Neukom Decl. Ex. 2) at 17:12-18:20; Opening Rpt. (Neukom Decl. Ex. 1) at ¶31,
 15 Opening Rpt. (Wong Decl. Ex. 1) at ¶32. Professor Almeroth testified that in order to actually
 16 determine that something has been copied, there is a “multistep process” that should be followed
 17 where detecting “similarity” is just the first step. Almeroth Tr. (Neukom Decl. Ex. 2) 17:12-
 18 18:20. In order for Professor Almeroth to reach an expert opinion on copying, therefore, he
 19 needed additional evidence, such as [REDACTED]

20 [REDACTED] *Id.* To formulate his opinions Professor Almeroth thus applied his
 21 scientific, technical, and specialized knowledge in detecting copying. The analysis was not [REDACTED]
 22 [REDACTED]⁴ Mot. at 10.

23 **III. CONCLUSION**

24 For the foregoing reasons, Cisco respectfully requests that the Court deny Arista’s Motion.

25 ³ Arista never explains why the copying of text in user documentation is any different than the
 26 many other similar forms of copying Professor Almeroth opined on that Arista does not challenge.

27 ⁴ Arista also complains that Professor Almeroth [REDACTED]
 28 [REDACTED]

1 Dated: August 19, 2016

Respectfully submitted,

2 /s/ John M. Neukom

3 Kathleen Sullivan (SBN 242261)
4 kathleensullivan@quinnmanuel.com
5 QUINN EMANUEL URQUHART &
6 SULLIVAN LLP
7 51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

8 Sean S. Pak (SBN 219032)
seanpak@quinnmanuel.com
9 Amy H. Candido (SBN 237829)
amycandido@quinnmanuel.com
John M. Neukom (SBN 275887)
johnneukom@quinnmanuel.com.
10 QUINN EMANUEL URQUHART &
11 SULLIVAN LLP
12 50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700

13
14 Mark Tung (SBN 245782)
marktung@quinnmanuel.com
15 QUINN EMANUEL URQUHART &
16 SULLIVAN LLP
17 555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
Telephone: (650) 801-5000
Facsimile: (650) 801-5100

18
19 Steven Cherny *admitted pro hac vice*)
steven.cherny@kirkland.com
20 KIRKLAND & ELLIS LLP
21 601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

22
23 Adam R. Alper (SBN 196834)
adam.alper@kirkland.com
24 KIRKLAND & ELLIS LLP
25 555 California Street
San Francisco, California 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

26
27 Michael W. De Vries (SBN 211001)
michael.devries@kirkland.com
28 KIRKLAND & ELLIS LLP
333 South Hope Street

1 Los Angeles, California 90071
2 Telephone: (213) 680-8400
3 Facsimile: (213) 680-8500

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Attorneys for Plaintiff Cisco Systems, Inc.